Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

WYMAN-GORDON FORGINGS, INC.,
AND WYMAN-GORDON COMPANY
Petitioners,

v.

THE HONORABLE LAMAR MCCORKLE, *et al.*
Respondents.

Petition for a Writ of Certiorari to the Texas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

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November 6, 1998

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QUESTION PRESENTED

Where the federal Occupational Safety and Health Administration had promised petitioner confidentiality of its witness statements taken in investigating an industrial accident, and those statements would accordingly be privileged from discovery under federal law if sought from OSHA, did the Texas Supreme Court err by allowing respondents (plaintiffs in wrongful death actions) to obtain those same statements in discovery from petitioner, thus nullifying the federal privilege and depriving petitioner of the benefit of OSHA's promise of confidentiality?

PARTIES TO THE PROCEEDING BELOW

RELATORS/DEFENDANTS:

Wyman-Gordon Company

Wyman-Gordon Forgings, Inc.

DEFENDANT:

Cooper Cameron Corporation

RESPONDENT:

The Honorable Lamar McCorkle

REAL PARTIES IN INTEREST/PLAINTIFFS:

Melody Ann Nagy, Individually and as Adminstratrix of the Estate of Steven Armand Nagy, Deceased, and as Next Friend of Minors Nicholas Anthony Nagy and Jacob Armand Nagy; and Louis John Nagy and Theresa Carrol Nagy

Jerene Terry, Individually and as Personal Representative of the Estae of Donald Terry, Sr., Deceased; and Donald-Lewis Terry, Jr.; Michael Joseph Terry; Lena Terry Davis; and Audrey Terry

Mary Lightfoot, Individually and as Personal Representative of the Estae of Amos Carroll Lightfoot, Deceased; and Mark Lightfoot; Scott Lightfoot; and Rusty Lightfoot

Jimmy Galindo; Esther Galindo

Darrin Sweat; Shawna Sweat

Maria M. Uribe; Saul Uribe; and Enrique Uribe

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF PETITIONERS

Pursuant to this Court's Rule 29.6 the nonwholly owned subsidiaries of Wyman-Gordon Company are: Wyman-Gordon Composite Technologies; Inc.; Scaled Composites, Inc.; Western Australian Specialty Alloys, Pty. Ltd.; International Extruded Products, LLC; Wyman-Gordon Titanium Castings, LLC; and WGK AVISMA Titanium. In addition, Cooper Industries, Inc. owns 38 per cent of the outstanding shares of Wyman-Gordon Company stock.

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IN THE

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No. _____

WYMAN-GORDON FORGINGS, INC.,
AND WYMAN-GORDON COMPANY

Petitioners,

v.

THE HONORABLE LAMAR MCCORKLE, *et al.*

Respondents.

Petition for a Writ of Certiorari to the Texas Supreme Court

PETITION FOR A WRIT OF CERTIORARI

Wyman-Gordon Forgings, Inc. and the Wyman-Gordon Company[1] petition for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

OPINIONS BELOW

The order and judgment of the Texas Supreme Court (Pet. App. 1a), dated October 15, 1998, denying Wyman-

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[1] Wyman-Gordon Forgings, Inc., is a wholly owned subsidiary of Wyman-Gordon Company. We will refer to the two as "petitioner" herein. "Respondents" generally refers herein to the plaintiffs in the wrongful death – personal injury action who were "real parties in interest" in the state-court mandamus action of which review is sought here.

Gordon's Petition for Writ of Mandamus is unreported. The order of the Court of Appeals for the Fourteenth Judicial District of Texas (Pet. App. 6a), dated May 7, 1998, denying the Petition for Writ of Mandamus is unreported. The order of the District Court for the 133rd Judicial District of Harris County Texas (Pet. App. 2a), dated April 17, 1998, is unreported.

JURISDICTION

The judgment of the Texas Supreme Court was entered on October 15, 1998. No petition for rehearing was submitted to the court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

STATEMENT

A. Statement of Facts

Following an industrial accident at the Cypress, Texas, facility of petitioner Wyman-Gordon Forgings, Inc. on December 22, 1996, in which eight of its employees were killed and others injured, the Occupational Safety and Health Administration ("OSHA"), an agency within the United States Department of Labor, began an investigation into the cause of the accident. Petitioner set out to cooperate and did cooperate comprehensively with the investigation, making it unnecessary for OSHA to use its extensive but comparatively cumbersome investigatory powers of searches requiring warrants, compelled production of documents, and compelled witness interviews and statements. *See* Hoeg Affid. ¶¶ 4-7 (Pet. App. 12a). Petitioner voluntarily permitted full access to its facility to expedite the investigation into the cause of the accident. It also provided all requested documents and aided the inspectors' review of those documents by pointing to the relevant categories to request. Further, petitioner allowed OSHA to conduct interviews of its employees and to take sworn statements of other employees and managers of the facility. Wyman-Gordon's wide-ranging assistance assured that OSHA could complete its investigation within the six-

month period required by the Occupational Safety and Health Act, 29 U.S.C § 658(c). That investigation resulted in a negotiated settlement under which OSHA imposed a $1.8 million civil penalty against Wyman-Gordon as well as intensified monitoring and supervision by OSHA of Wyman-Gordon's operations for a two-year period, starting June 18, 1997.

Petitioner's decision to cooperate with OSHA's investigation was secured, in large part, by an understanding and express agreement with OSHA officials that the witness statements sought by and provided to OSHA would be kept confidential by OSHA. This confidentiality promise was made in compliance with OSHA's Field Inspection Manual.[2] The promise of confidentiality was beneficial to OSHA's investigation because it induced Wyman-Gordon to provide a level of cooperation that otherwise would have been forthcoming only by way of a court order and then only as necessary to comply with any such order. Petitioner's decision to maintain a cooperative attitude also served as a signal to its employees to volunteer any information necessary to the successful and swift completion of OSHA's investigation, even beyond that which might have been specifically sought by the agency.[3] OSHA representatives assured petitioner that petitioner's cooperation was instrumental in allowing OSHA to complete its investigation within the time set by statute. Hoeg Affid. ¶ 9 (Pet. App. 13a-14a).

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[2] OSHA Instruction CPL 2.103 § II.A.4.e(5) (Pet. App. 9a). The instruction provides that the witness statement may be used only in OSHA proceedings, either administrative or in court.

[3] Even as against OSHA's significant investigatory powers, it is possible for a company to materially delay and impede an OSHA investigation by familiar techniques of producing great volumes of documents and, while not resisting interviews of employees, nonetheless refraining from volunteering which documents are relevant and which employees have various kinds of information.

Petitioner agreed to facilitate the OSHA investigation, even as it was certain that it would soon be facing wrongful death and personal injury lawsuits based on the accident, because it believed that information developed as part of OSHA's investigation would be immune from discovery in any future civil action. In deciding to give full cooperation to the OSHA investigation, therefore, Wyman-Gordon relied on the assurance that testimony in OSHA's investigatory files would not be used against it in subsequent litigation.

B. Procedural History

The present case arises out of the wrongful death and personal injury lawsuit that was, as anticipated by petitioner, brought in Texas state court by some of the survivors of the employees killed and by some of the employees injured in the Cypress plant accident. *Melody Ann Nagy et al v. Wyman-Gordon Company, et al*, District Court of Harris County (Tex.), 133d Judicial District, No. 97-52958. Some of the plaintiffs in that suit, respondents here, have sought discovery from petitioner of transcripts of the sworn statements of Wyman-Gordon employees that were taken by OSHA's investigators, notwithstanding the fact that those statements were taken and copies of those transcripts were provided to petitioner by OSHA with the express assurance of OSHA that they would remain confidential. Hoeg Affid. ¶ 8 (Pet. App. 12a-13a). In fact the OSHA statements bear a "confidential" stamp on their cover pages, and the OSHA examiner states on the record in a number of the statements that they are confidential. The employees who have given statements to OSHA have been available to be deposed by the respondents in the ordinary course of discovery.

After Wyman-Gordon objected to that discovery request, arguing among other things that the material sought by plaintiffs was subject to a federal investigative privilege, the Harris County district court granted the plaintiffs' motion to compel production of the transcripts. The trial court's

order was not accompanied by an opinion and did not specifically address petitioner's investigative privilege claim. Wyman-Gordon unsuccessfully sought review, by way of a petition for mandamus, to the Texas Court of Appeals, and then to the Texas Supreme Court, in both instances repeating its argument that production of the statement transcripts would undermine the integrity of a federal agency's investigation. The Texas Supreme Court by order dated October 15, 1998, and without opinion, refused the writ of mandamus. The Harris County trial court has stayed its order to allow petitioner to seek a writ of certiorari from this Court. Pet. App. 7a.

REASONS WHY THE WRIT SHOULD BE GRANTED

The Texas state courts have erroneously disposed of important issues of federal law concerning the confidentiality of information obtained in the course of a federal investigation. In so doing, Texas has decided an important issue of federal law in a fashion that evades and effectively destroys the federal evidentiary privilege possessed by OSHA and denies petitioner the benefit of OSHA's assurance of confidentiality. There is no question that the materials here at issue are privileged in the hands of OSHA, that such investigatory privilege exists because without it agencies' ability to investigate would be impaired, and that OSHA promised confidentiality to petitioner in this case. The Texas decision creates an important precedent because it establishes a means to evade the privilege and to deny the protection of promises of confidentiality made by a federal agency conducting an investigation.

Further, respondents, plaintiffs in the Harris County litigation, would suffer no cognizable loss of information from reversal of the Texas Supreme Court's decision. The employees of petitioners who made the statements at issue to OSHA have been available to be deposed by counsel for respondents in the discovery process of that state court

litigation.[4] Moreover, the procedure for taking the statements did not allow for questions or objections by petitioner's counsel. The only reason why respondents would also seek the statements taken by OSHA would be to take advantage of the confidential, one-sided, and selective nature of the communication between petitioner's employees and the OSHA investigators.[5]

1. *A federal investigative privilege shields the statement transcripts in petitioner's possession from discovery in state court proceedings.* Confidential information provided to a federal government agency in the course of an official investigation, such as the statements at issue, is subject to a qualified privilege in order to encourage "frank and open discussion and hence efficient governmental operations." *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 796 (1984).[6] The Court there observed that such a privilege "is recognized because the government would not be able to obtain the information but for its assurance of

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[4] Wyman-Gordon's possession of transcripts of the statements of its employees, which was complained of by respondents in the Texas courts as a kind of waiver of confidentiality, is nothing of the sort. Wyman-Gordon counsel were entitled to be present at the questioning of their employees who were managers or whose testimony could subject the company to vicarious liability (Texas Disciplinary Rules of Professional Conduct Rule 4.02(c)(1) and (2)). And even if Wyman Gordon did not have copies of the transcripts of the OSHA interviews, respondents' counsel could not ask petitioner's employees in depositions what questions had been asked by OSHA investigators and what their replies were because that would just as surely breach the investigative privilege. *See In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988) (privilege may be asserted to protect testimony about or other disclosure of the contents of investigative files).

[5] The transcripts "constitute opinion and analysis work because the witnesses deposed as well as the questions asked reveal the nature and direction" of the agency's investigation. *Ross v. Bolton*, 106 F.R.D. 22, 24 (S.D.N.Y. 1985) (finding persuasive analogy between work product and investigative privileges).

[6] Although *Weber Aircraft* involved a claim under exemption 5 of the Freedom of Information Act, 5 U.S.C. § 552 (b)(5), and the Court thus assumed for the purposes of the case that the material sought by petitioners was privileged, the Court nevertheless recognized the viability of asserting the privilege in civil litigation. 465 U.S. at 802 n.20.

confidentiality." Id. at 803 n.23. *See Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1349 (D.C. Cir. 1984) (dissenting opinion) (federal courts have recognized a number of governmental privileges, including a qualified privilege for investigatory information, that limit civil discovery). The investigative privilege applies to any government agency's conduct of a criminal, civil or administrative investigation. *In re Sealed Case*, 856 F.2d 268 (D.C. Cir. 1988) (investigative privilege safeguards public interest in integrity of civil and criminal investigations); *Marshall v. Elward*, 399 N.E.2d 1329 (Ill. 1980) (privilege shields information obtained by OSHA in accident investigation). *See Ross v. Bolton*, 106 F.R.D. 22 (S.D.N.Y. 1985) (discovery of transcripts of statements taken by NASD as part of investigative effort denied, owing to strong public policy encouraging witness cooperation and in absence of showing that information was not available from any other source).

The Illinois Supreme Court has invoked the investigative privilege to bar discovery directly from OSHA in a case otherwise strikingly similar to the present. In *Marshall v. Elward*, 399 N.E.2d 1329 (Ill. 1980), a workman injured in an industrial accident sought to obtain an OSHA investigative file, including the statements of employee witnesses that had been obtained by OSHA as part of its formal investigation into the accident, for its use in a personal injury lawsuit. The court held that the witness statements were privileged from discovery because producing them might interfere with OSHA's enforcement proceedings. 399 N.E.2d at 1333. *Cf. Eli Lilly & Co. v. Marshall*, 850 S.W.2d 155 (Tex. 1993)(discovery of physician reports of drug adverse reactions barred because federal regulation barred their being made public).[7]

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[7] The existence of the exemption from disclosure under the Freedom of Information Act for investigatory materials, 5 U.S.C. § 552(b)(7), supports this

While such a privilege is qualified rather than absolute, where a party makes no showing of need for a confidential document, the investigative privilege will bar discovery. And where, as in the present case, the deponent has been available for a civil deposition, the privilege should protect the investigatory deposition from discovery. *Cf. Collins v. Shearson/American Express, Inc.*, 112 F.R.D. 227 (D.D.C. 1986) (deposition transcript acquired by Commodity Futures Trading Commission during investigation of potential fraudulent commodities trading protected by investigative privilege where party had opportunity to take deposition and had acquired a copy of transcript from another source). Moreover, under OSHA procedures, the identities of the persons giving information to an OSHA investigation, along with any information from which those identities could be determined, are absolutely privileged and may not be revealed in any circumstances. OSHA Instructions CPL 2.45 B(B)(7)(a). Pet. App. 10a. The Texas courts' decision also destroys the protection of this unconditional rule.

2. *This Court should grant certiorari to resolve the important question of whether the investigative privilege can be avoided by obtaining the privileged material in discovery not from the federal agency itself, but from the person who supplied it to the agency under a promise of confidentiality.* In the present case the Texas courts have ordered the production of materials from petitioners even

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view even though not directly applicable (because that Act applies only to information requests made to federal agencies). The statutory exemptions under FOIA "reflect a congressional judgment that certain delineated categories of documents" should not be routinely made available to the public. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d at 1344 (in weighing discovery requests for confidential government documents in the course of civil litigation, courts must give weight to the policies underlying the statutory [exemptions]"). The Illinois Supreme Court has also recognized the similarity between the formal exemptions to the Freedom of Information Act and the common law investigatory privilege. *See Marshall*, 399 N.E.2d at 1332 (acknowledging that FOIA exemptions represent codification of common law privileges).

though the same materials would be privileged if sought from OSHA. But what is privileged from disclosure in the hands of OSHA should not be discoverable from the hands of those who provided the privileged material to OSHA.[8] If left undisturbed the decision below will provide the opportunity to nullify the value of the promise of confidentiality that OSHA made to petitioner and, indeed, to all others whose cooperation is sought by federal agencies conducting investigations. This will adversely affect the willingness of such persons to cooperate and the ability of federal agencies to maintain the confidentiality of their investigative materials. The Texas Supreme Court holding in short provides a handy means, useful wherever there is or can be private litigation on the same or related subject matter as the agency investigation, to eviscerate the rationale and effectiveness of this Court's holding in *Weber Aircraft*, the Illinois Supreme Court's decision in *Marshall v. Elward* and other decisions finding a value in an investigative privilege. For that reason this Court should review the decision.

When analogous issues have arisen, courts have held that the material in the hands of the person who submitted it to the agency must be protected from discovery just as it would be in the hands of the investigating agency. While *Eli Lilly & Co. v. Marshall*, supra, involved adverse drug reaction reports from doctors required by federal regulation to be submitted to and kept confidential by the Food and Drug Administration (and thus did not involve an investigation or the investigative privilege), the Texas Supreme Court did recognize that allowing the plaintiffs in a private lawsuit to obtain from the drug manufacturer information that could not be obtained from the FDA would undermine the purposes

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[8] We assert only that the privilege ought to apply to information in the hands of the submitter that was generated at the request of the agency, not to previously created information turned over to the agency. Petitioner did not object to respondents' discovery requests for previously created documents on the ground that such documents had been turned over to OSHA.

behind the regulations. Similarly, where the District of New Jersey held that documents gathered by the New Jersey Department of Gaming Enforcement were subject to an investigative privilege arising under the confidentiality provisions of the state Casino Control Act, that court held that a witness who had made a statement as part of the investigation could assert the privilege with respect to a copy of his statement that was given to him by the investigating agency. *Canadian Imperial Bank of Commerce v. Boardwalk Regency Corp.*, 108 F.R.D. 737 (D.N.J. 1986). The court held that giving a copy of the statement to the witness did not waive the confidentiality of the investigative privilege because the state investigative agency's regulations required it to do so. The witness was then permitted to assert the privilege to prevent undermining the effectiveness of the investigative agency's work and to avoid "chilling" witnesses' cooperation with future investigations. *Id.* at 740.

Finally, respondents, plaintiffs in the Harris County litigation, would suffer no cognizable loss of information from reversal of the Texas Supreme Court's decision. The employees of petitioners who gave the statements at issue to OSHA have all been available to be deposed by counsel for respondents in the discovery process of that personal injury litigation. The only reason why respondents would also seek the statements taken by OSHA would be to take advantage of the confidential nature of the communication between Wyman-Gordon and the OSHA investigators. This is not a legitimate reason and should not be permitted.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 6, 1998

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APPENDIX

THE SUPREME COURT OF TEXAS

Orders Pronounced October 15, 1998

* * *

MISCELLANEOUS

98-0477 IN RE WYMAN-GORDON FORGINGS, INC. and WYMAN-GORDON COMPANY

motion for sanctions overruled
motion for expedited consideration dismissed as moot

(Justice Hankinson not sitting)

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT
NO. 97-52958

MELODY ANN NAGY, Individually and as Administratrix of the Estate of STEVEN ARMAND NAGY, DECEASED, and as Next Friend of Minors NICHOLAS ANTHONY NAGY and JACOB ARMAND NAGY; and LOUIS JOHN NAGY AND THERESA CARROL NAGY

JERENE TERRY, Individually and as Personal Representative of the Estate of DONALD TERRY, SR., DECEASED; and DONALD LEWIS TERRY, JR.; MICHAEL JOSEPH TERRY; LENA TERRY DAVIS; AND AUDREY TERRY MARY LIGHTFOOT, INDIVIDUALLY and as Personal Representative of the Estate of AMOS CARROLL LIGHTFOOT, DECEASED; and MARK LIGHTFOOT; SCOTT LIGHTFOOT; and RUSTY LIGHTFOOT

V.

WYMAN-GORDON COMPANY, WYMAN-GORDON FORGINGS, INC., and COOPER CAMERON CORPORATION

ORDER

Plaintiffs' Motion to Compel, Defendants' Response, and all evidence submitted at the oral hearing on these matters were considered by the Court, along with authorities and oral argument submitted. The Court rules as follows:

1. The Plaintiffs' Motion to Compel concerning Requests Nos. 4 and 5, generally seeking information about a 1993 investigation at the

Wyman-Gordon Grafton plant, is denied at this time;

2. The Plaintiffs' Motion to Compel concerning Request No. 6, seeking sworn statements taken by OSHA during its investigation, is granted;

3. The Plaintiffs' Motion to Compel concerning Request No. 3, seeking personnel files, is granted in part and denied in part. Defendants are to identify the confidential and private information, create a privilege log describing that information, and produce the file material which they do not contend is confidential or private. Plaintiffs will review the privilege log and determine whether additional information will be sought and whether an in camera inspection will be necessary; and

4. If Defendants seek accelerated mandamus relief within ten days of this Order, the Court will not enforce paragraph 2 of this Order pending resolution in the appellate courts.

SIGNED this 17th day of April, 1998.

/s/
JUDGE LAMAR McCORKLE

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Petition for Writ of Mandamus Denied and Opinion filed May 7, 1998.

IN THE

Fourteenth Court Of Appeals

NO. 14-98-00454-CV

IN RE WYMAN-GORDON FORGINGS, INC. and WYMAN-GORDON COMPANY, *Relators*

ORIGINAL PROCEEDING
WRIT OF MANDAMUS

OPINION

On April 24, 1998, relators filed a petition for writ of mandamus in this Court. *See* TEX. Gov't CODE ANN. § 22.221 (Vernon 1988 & Supp. 1998). On April 30, 1998, the real parties in interest filed their response.

After due consideration, we deny relator's petition for writ of mandamus.

PER CURIAM

Petition Denied and Opinion filed May 7, 1998.
Panel consists of Justices Lee, Anderson and Edelman
(Justice Lee not participating).
DO NOT PUBLISH – TEX. R. APP. P. 47.3(B).

IN THE DISTRICT COURT OF HARRIS COUNTY TEXAS
133RD JUDICIAL DISTRICT COURT

No. 97-52928

MELODY ANN NAGY, *et al.*

vs.

WYMAN-GORDON COMPANY, *et al.*

ORDER on Plaintiffs' Request for Immediate Release of Documents

On Plaintiffs' request for the immediate release of sworn statements taken from certain Wyman-Gordon employees by OSHA following the explosion made the basis of this case, the Court ORDERS as follows:

1. The Wyman-Gordon defendants shall deliver to the Court on or before 10-19-98, marked "Confidential, for *In Camera* Review," a copy of all sworn statements taken by OSHA in connection with the accident at the Cypress plant on 12-22-96 which are in the possession of the Wyman-Gordon defendants and their counsel.
2. Those sworn statements shall be released to the plaintiffs by the Court if no appeals are taken as set out in this order.
3. The Wyman-Gordon defendants have until 10-23-98 to file an accelerated motion for rehearing with the Supreme Court of Texas.
4. The Wyman-Gordon defendants have until 11-6-98 to file an accelerated application for writ

of certiorari to the Supreme Court of the United States of America.

5. If either of the appeals described above are timely filed, the documents described above shall be held by the Court and not released to plaintiffs until the appeals are completed, or until further order of this Court.

Signed this 16th day of October, 1998.

/s/
Judge Presiding

Approved as to Form:

/s/ Michael Connally
Attorney for the
Wyman-Gordon Defendants

Approved as to Form:
/s/
Attorney for the Nagy Family
/s/
Attorney for [illegible] Family

FIELD INSPECTION
REFERENCE MANUAL

U.S. Department of Labor
Occupational Safety
and Health Administration

OSHA Instruction CPL 2.103

A. 4. e. (5) *Interview Statements.* Interview statements of employees or other individuals shall be obtained whenever the CSHO determines that such statements would be useful in documenting adequately an apparent violation.

(a) Interviews shall normally be reduced to writing, and the individual shall be encouraged to sign and date the statement. The CSHO shall assure the individual that the statement will be held confidential to the extent allowed by law, but they may be used in court/hearings.

OSHA Instruction CPL 2.45B

A. Policy and Procedures.

1. **Policy**. OSHA's policy regarding the disclosure of documents in investigation and other files is governed by the Freedom of Information Act (FOIA) as amended (5 U.S.C. 552) and the Department of Labor's regulations in implementation thereof (29 CFR 70). Specific guidelines for the application of this policy to OSHA case file documents are set forth in B.

* * *

B. Specific Guidelines.

7. **Disclosure of Witnesses' Statements**. Witnesses' statements may be disclosed when disclosure does not interfere with enforcement proceedings, constitute an unwarranted invasion of personal privacy or reveal a confidential source.

a. The factual information contained in witness statements is protected only to the degree that it may reveal the identity of the person giving the information. To ensure that the privacy of witnesses is maintained, all information which may indicate their identities shall be deleted, both from the statement and any attached or referenced materials.

b. Where there is a small number of witnesses (less than 8 as a rule), it is generally considered impossible to separate disclosable and nondisclosable information and still maintain the anonymity of the witnesses involved. For this reason, in such circumstances, all the witness statements may be withheld in full.

IN THE DISTRICT COURT OF HARRIS COUNTY, TEXAS
133RD JUDICIAL DISTRICT

NO. 97-52958

MELODY ANN NAGY, Individually And as Administratix of the Estate of STEVEN ARMAND NAGY, Deceased, *et al.*

V.

WYMAN-GORDON COMPANY, *et al.*

AFFIDAVIT OF MATTHEW L. HOEG

STATE OF TEXAS	KNOW ALL MEN BY
COUNTY OF HARRIS	THESE PRESENTS
	THAT:

BEFORE ME, the undersigned authority, did personally appear Matthew L. Hoeg, who deposed and stated as follows:

1. "My name is Matthew L. Hoeg and I am over twenty-one (21) years of age, and am fully competent to make this Affidavit. I am an attorney licensed to practice law in and by the State of Texas.

2. I am admitted to practice before all federal and state courts in the State of Texas; various United States District Courts outside of Texas; the United States Fifth Circuit Court of Appeals; and the United States Ninth Circuit Court of Appeals.

3. I am a partner in the law firm of Mayor, Day, Caldwell & Keeton, L.L.P., and I am in charge of the law firm's Labor & Employment law practice.

4. On December 23, 1996, I began representing Wyman-Gordon Forgings, Inc. with respect to the industrial accident that occurred on December 22, 1996 at Wyman-Gordon Forgings, Inc.'s Houston, Texas location. In this accident eight men were killed and two others were injured. As a result of the circumstances surrounding the accident and the resulting deaths and injuries, we anticipated that litigation would result.

5. As part of my duties, I served as the primary attorney representing Wyman-Gordon Forgings, Inc. with respect to the investigation by the United States Department of Labor, Occupational Safety and Health Administration ("OSHA"). I was also one of several attorneys involved in preparing the defense of any claims by all persons injured or killed as a result of the industrial accident of December 22, 1996.

6. During the course of OSHA's investigation, I met, generally on a daily basis, with Mr. John Lawson, OSHA's Assistant Area Director, and the investigator in charge of OSHA's on-site investigation.

7. During the course of OSHA's investigation, Mr. Lawson and I reached numerous agreements that were designed to facilitate, and expedite, the separate, but cooperative, investigations being conducted by OSHA and by Wyman-Gordon Forgings, Inc. These agreements concerned, *inter alia,* site access, control and operations; evidence collection and retention; document production, usage, and retention; and OSHA's access to, and obtaining sworn statements from, employees and agents of Wyman-Gordon Forgings, Inc.

8. With respect to the issue of OSHA's access to, and obtaining sworn statements from, employees and agents of Wyman-Gordon Forgings, Inc., Mr. Lawson and I agreed that

Wyman-Gordon Forgings, Inc. and various related entities, would make such employees available to OSHA investigators during work hours, and that Wyman-Gordon Forgings, Inc. would permit, and not object to, OSHA obtaining sworn statements from these employees, in exchange for OSHA's agreement to:

a. permit Wyman-Gordon Forgings, Inc.'s counsel to attend the interview sessions of management employees;

b. permit Wyman-Gordon Forgings, Inc.'s counsel to attend the interview sessions of non-management employees when specifically requested;

c. provide copies of all sworn statements to Wyman-Gordon Forgings, Inc.'s counsel for use in its investigation of the accident, and in its preparation of a defense to any resulting lawsuits that might be filed;

d. consider and treat the sworn statements, and all information therein, as confidential and proprietary information belonging to Wyman-Gordon Forgings, Inc.;

e. not disclose the sworn statements, or any information therein, to any third parties; and

f. not use the sworn statements, or any information therein, except in any proceeding initiated under the Occupational Safety and Health Act (the "Act").

9. The agreements that Mr. Lawson and I made during the course of OSHA's investigation, were precipitated, in part, by OSHA's need to receive an extraordinary level of assistance and cooperation from Wyman-Gordon Forgings, Inc. to enable OSHA to accomplish its investigation within the six-month time period mandated by the Act. Mr. Lawson and other OSHA investigators, repeatedly acknowledged, both during and after their on-site investigation, that Wyman-Gordon Forgings, Inc.'s willingness to make such cooperative

agreements was instrumental in enabling OSHA to accomplish its investigation within the statutorily prescribed six-month time period.

Further, Affiant sayeth not.

/s/
Matthew L. Hoeg

SWORN TO and SUBSCRIBED before me on this the 11th day of March 1998, to certify which witness my hand and official seal.

(Seal)

/s/ Bonnie Cutler
Notary Public in and for the
State of Texas

Supreme Court, U.S.
FILED
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CLERK

No. 98-805

In The

Supreme Court of the United States

October Term, 1998

WYMAN-GORDON FORGINGS, INC.,
AND WYMAN-GORDON COMPANY,

Petitioners,

v.

THE HONORABLE LAMAR McCORKLE, et al.,

Respondents.

On Petition For Writ Of Certiorari
To The Supreme Court Of Texas

BRIEF IN OPPOSITON

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November 1998

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QUESTION PRESENTED

Where the Occupational Safety and Health Administration released witness statements to defendants-petitioners, are they subject to discovery under Texas law?

PARTIES TO THE PROCEEDING BELOW

RELATORS/DEFENDANTS:
Wyman-Gordon Company
Wyman-Gordon Forgings, Inc.

DEFENDANT:
Cooper Cameron Corporation

RESPONDENT:
The Honorable Lamar McCorkle

REAL PARTIES IN INTEREST/PLAINTIFFS:
Melody Ann Nagy, Individually and as Administratrix of the Estate of Steven Armand Nagy, Deceased, and as Next Friend of Minors Nicholas Anthony Nagy and Jacob Armand Nagy; and Louis John Nagy and Theresa Carrol Nagy
Jerene Terry, Individually and as Personal Representative of the Estate of Donald Terry, Sr., Deceased; and Donald-Lewis Terry, Jr.; Michael Joseph Terry; Lena Terry Davis; and Audrey Terry
Mary Lightfoot, Individually and as Personal Representative of the Estate of Amos Carroll Lightfoot, Deceased; and Mark Lightfoot; Scott Lightfoot; and Rusty Lightfoot
Jimmy Galindo; Esther Galindo
Darrin Sweat; Shawna Sweat
Maria M. Uribe; Saul Uribe; and Enrique Uribe

PARENT COMPANIES AND NONWHOLLY OWNED SUBSIDIARIES OF PETITIONERS

Pursuant to this Court's Rule 29.6 the nonwholly owned subsidiaries of Wyman-Gordon Company are: Wyman-Gordon Composite Technologies, Inc.; Scaled Composites, Inc.; Western Australian Specialty Alloys, Pty. Ltd.; International Extruded Products, LLC; Wyman-Gordon Titanium Castings, LLC; and WGK AVISMA Titanium. In addition, Cooper Industries, Inc. owns 38 per cent of the outstanding shares of Wyman-Gordon Company stock.

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BRIEF IN OPPOSITION

Melody Ann Nagy, Individually and as Administratrix of the Estate of Steven Armand Nagy, Deceased, and as Next Friend of Minors Nicholas Anthony Nagy and Jacob Armand Nagy; and Louis John Nagy and Theresa Carrol Nagy; Jerene Terry, Individually and as Personal Representative of the Estate of Donald Terry, Sr., Deceased; and Donald-Lewis Terry, Jr.; Michael Joseph Terry; Lena Terry Davis; and Audrey Terry; Mary Lightfoot, Individually and as Personal Representative of the Estate of Amos Carroll Lightfoot, Deceased; and Mark Lightfoot; Scott Lightfoot; and Rusty Lightfoot; Jimmy Galindo; Esther Galindo, Darrin Sweat; Shawna Sweat; Maria M. Uribe; Saul Uribe; and Enrique Uribe, Plaintiffs-Respondents, file this their reply to the Petition for a writ of certiorari to review the judgment of the Texas Supreme Court in this case.

JURISDICTION

An order of the Texas Supreme Court was entered on October 15, 1998. No petition for rehearing was submitted to the court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257, however, the defendants-petitioners' own writing demonstrates there is no jurisdiction. The decision of which review is sought is not a final judgment or decree and does not dispose of an issue of federal law.

STATEMENT

A. Statement of Facts

The plaintiffs-respondents respectfully disagree with defendants-petitioners' Statement of Facts. The only record below is a hearing on a discovery proceeding in state court. There was no testimony taken by the court and the only "evidence" received supporting petitioners assertions was the affidavit of one of its lawyers, Matthew Hoeg. The Hoeg Affidavit has been made part of Petitioner's Application (Pet. App. 12a). Clearly, it is no more than argument of counsel.

The facts are simple. On December 22, 1996, eight men were killed in an explosion at Wyman-Gordon Forgings, Inc., Houston, Texas. The petitioners are the owners and/or operators of the facility where the explosion occurred. During the investigation of the event, representatives of the Occupational Safety and Health Administration ("OSHA") took numerous witness statements. Copies of the statements were given to defendants-petitioners.

B. Procedural History

In a state court action filed by the families of the dead and injured, the trial judge ordered that the statements possessed by petitioners in question were discoverable under Texas law. The defendants-petitioners sought a writ of mandamus to the intermediate court of appeals. The writ was denied without opinion. The defendants-petitioners then sought writ of mandamus to the Texas Supreme Court. The writ was denied without opinion.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

I. THE TEXAS STATE COURT DECISION IS NOT FINAL

Under 28 U.S.C. § 1257, Supreme Court review of state court decisions is available only with respect to "final judgments or decrees rendered by the highest court of a state in which a decision could be had." The rule of finality that is set forth in § 1257 is rooted in important considerations of policy: "[I]t avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real 'case' or 'controversy' in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs."[1]

This proceeding is so far from "final" that it can appropriately be said to be at the opposite end of the continuum. No trial has been concluded – trial has not even started. Indeed, defendants-petitioners are complaining about nothing more than a discovery motion. Obviously the precious resources of this nation's highest court cannot be squandered on discovery disputes.

Moreover, subsequent rulings of the trial court may attenuate all, or at least many, of the concerns of defendants-petitioners. The court may decide that none of the witness statements is admissible, or that they are

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[1] North Dakota Pharmacy Board v. Snyder's Stores, 414 U.S. 156, 1959. See also Arceneaux v. State of Louisiana, 376 U.S. 336 (1964).

admissible for only limited purposes such as impeachment. Or, the court may decide to redact large portions of the statements. All such possible variations can be argued by the parties and, if necessary, eventually appealed through the Texas appellate courts. Only then, if at all, could there possibly be a "[f]inal judgment[ ] or decree[ ] by the highest court of a state" so that a petition for certiorari would be within this Supreme Court's jurisdiction under 28 U.S.C. § 1257.

II. THE DECISION RESTS ON AN INTERPRETATION OF A TEXAS STATE STATUTE ON PRETRIAL DISCOVERY, WHICH IS AN INDEPENDENT AND ADEQUATE STATE GROUND.

If a state court proceeding rests on a determination of state law, "the Supreme Court has no jurisdiction to review the case."[2] Such judgments, as Justice Brennan once said, "not only cannot be overturned by, [but] indeed are not even reviewable by, the Supreme Court of the United States. We are utterly without jurisdiction to review such cases"[3] The constitutional basis for the Court's inability to review such state court judgments "is so obvious that it has rarely been thought to warrant statement. It is found in the partitioning of power

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[2] ROBERT L. STERN, EUGENE GRESSMAN, STEPHEN M. SHAPIRO, AND KENNETH S. GELLAM, SUPREME COURT PRACTICE (7th ed. 1993) § 3, 21 at 141.

[3] Justice Brennan, *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 501 (1977).

between the state and federal judicial systems and in the limitations of our own jurisdiction.[4]

This case, as defendants-petitioners' own writings make clear, involves nothing more than the interpretation of a Texas Rule of Civil Procedure.[5] Specifically, defendants-petitioners protest the trial court's decision to grant a motion to compel that was filed by plaintiffs-respondents in order to obtain certain witness statements. The statements were given by a number of individuals in the wake of a tragic industrial explosion that resulted in eight deaths and numerous injuries. The statements were given to officials of the Occupational Safety and Health Administration ("OSHA") which, in turn, gave the statements to defendants-petitioners. The issue that has divided the parties is whether these witness statements, in the hands of the defendants-petitioners, are discoverable. Plainly, if OSHA had wanted to limit the discoverability of these statements, it could have a) withheld them from all third parties, including defendants-petitioners, or, b) at the very least, joined in defendants-petitioners' opposition to the motion to compel. It did neither. In fact, OSHA is in no way involved in this state court discovery dispute, either as a party or witness.

Because the issue on which review is sought is purely one of state law, certiorari is not only unnecessary but also jurisdictionally impossible.

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[4] Herb v. Pitcairin, 324 U.S. 117, 125-26 (1945).

[5] Rule 166b(3)(c) of the Texas Rules of Civil Procedure.

III. IF THERE IS ANY ISSUE OF FEDERAL LAW, THE TRIAL COURT CORRECTLY DECIDED IT

There is no pending issue of federal law. No issue exists as to discovery from a federal agency or employee. As defendants-petitioners readily acknowledge, OSHA's investigation was completed in June, 1997 – 17 months ago. OSHA's "Field Inspection Reference Manual," to which defendants-petitioners cite, expressly provides that, "No duties, rights or benefits, substantive or procedural, are created or implied by this manual."

The OSHA Field Inspection Reference Manual demonstrates that defendants-petitioners' arguments about their "cooperation" with OSHA are ridiculous. Defendants-petitioners' cooperation was not tendered because of some vague and undocumented agreement, but rather because no employer has a right to object to sworn statement interviews. In fact, the interposing of an objection by an employer may be construed as a refusal of entry and/or interference with a compulsory process and dealt with accordingly by warrant and/or subpoena issued by a Federal Magistrate. The same authority is available to OSHA in obtaining interviews with employees.

The only possible "federal question" presented by this case, at this stage, is whether there is any aspect of federal law implicated by defendants-petitioners having to produce witness statements in their possession. The trial court evidently found none. OSHA has not submitted any writing to suggest that it believes any issue of federal law is at stake, and defendants-petitioners themselves can do no better than invoking "policy" arguments

and the language of the Freedom of Information Act upon which plaintiffs-respondents do even rely.

There was no error in the trial court's decision.

CONCLUSION

Because there is no final judgment or decree of which petitioner seeks review, because there is an independent and adequate state ground for the court's order, and because any possible issue of federal law was correctly decided, defendants-petitioners' petition for certiorari should be denied.

Respectfully submitted,

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Respondents.

Petition for a Writ of Certiorari to the Texas Supreme Court

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REPLY BRIEF

Wyman-Gordon Forgings, Inc. and the Wyman-Gordon Company file this Brief in Reply to the Opposition filed by those respondents who are plaintiffs/real parties in interest in the Texas courts.

ARGUMENT

Rather than seriously contest any ground stated in the Petition, the respondents have raised two arguments against certiorari that may be briefly disposed of.

1. Respondents assert that the decision of the Texas Supreme Court is not "final" within the meaning of 28 U.S.C. § 1257(a). They are in error. Unless this Court grants review, the confidential transcripts of the witness statements taken by OSHA will be turned over to respondents. This act

would permanently destroy their confidentiality, contrarily to the assurances provided to petitioner by OSHA, and would damage the policies behind, and the effectiveness of, the federal investigatory privilege (Pet. at 6-7). As respondents appear to admit, in carefully chosen language, this damage could not be rectified by later holdings. Opposition at 3-4 (". . . [S]ubsequent rulings . . . may *attenuate* all, or at least many, of the concerns of the [petitioners]" (emphasis added)). The Harris County trial court shares the view that the injury from turning over the witness statements would be irreparable, as evidenced by its stay of its order requiring production to provide petitioner the opportunity to seek certiorari from this Court. Pet. 5; Pet. App. 7a-8a.

In such circumstances, where under the decision of the highest court of a state the federal right asserted would be permanently lost absent review by this Court, that decision is final for purposes of certiorari. *E.g., South Dakota v. Neville,* 459 U.S. 553, 558 n. 6 (1983)(federal issue reviewable after decision of state supreme court because further proceedings ordered by that court would destroy any opportunity by petitioner to prevail upon the issue). Otherwise this Court would be powerless to correct the damage caused by the refusal of the Texas Supreme Court to grant relief.

2. The respondents also assert that the decision of the Texas courts rests upon an independent state-law ground (Opp. at 4-5). This claim is fundamentally in error. Petitioner argued to the Texas courts that a federal investigatory privilege protected the witness statements in petitioner's possession from discovery, just as those statements would be privileged if sought from OSHA. The Texas courts rejected that argument. The respondents seem to argue here that such a privilege does not exist unless OSHA claims it (Opp. at 5) and that accordingly only state-law issues are presented by the Petition. Respondents do not argue that an *alternative* state-law ground exists for the

decision, such that even if the federal privilege herein asserted were admitted to exist there would still be a ground under state law to require the documents in question to be produced. *Compare, e.g., Fox v. Muller,* 296 U.S. 207, 210 (1935). Instead, respondents' position is that the matter was decided below on the basis of state law because the federal privilege claimed by petitioner does not exist. But this Court is not deprived of jurisdiction to consider a question of federal law simply because a respondent asserts, or the court below found, that the federal claim lacks merit. Otherwise, this Court would be in the absurd position of being forced to determine the merits of a question before it could decide whether it had jurisdiction to grant certiorari. No such requirement exists. *Cf., e.g., Bell v. Hood,* 327 U.S. 678 (1946).

CONCLUSION

For these reasons and those stated in the Petition, the Petition for a writ of certiorari should be granted.

Respectfully submitted,

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